STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TONI E. HARRISON, Appellant, and STATE OF IOWA (DEPARTMENT OF HUMAN SERVICES), Appellee.	)	CASE NO. 05-MA-04

DECISION ON REVIEW

This matter is before the Public Employment Relations Board (PERB or Board) upon a Petition for Review filed by the State of Iowa pursuant to Iowa Code section 17A.15(3) and PERB rule 621-11.8, 621 I.A.C. 11.8 (8A,20). The State's petition seeks our reversal of a Proposed Decision and Order of a PERB administrative law judge (ALJ) which concluded that the State did not establish just cause for terminating the employment of Toni Harrison[1] as a Treatment Program Supervisor with the Iowa Department of Human Services' Civil Commitment Unit for Sexual Offenders (CCUSO) at the Cherokee Mental Health Institute. Harrison was terminated for violating various work rules by making false statements about a fellow employee during an investigation.

An evidentiary hearing was held before the ALJ, who issued his proposed decision and order pursuant to Iowa Code section

[1] Harrison remarried after filing her appeal and now uses the last name "Johnikin." In this decision we will continue to refer to her as "Harrison."

17A.15(2). Pursuant to PERB rule 621-11.8 and subrule 621-9.2(3), we have heard this case upon the record submitted before the ALJ. Oral arguments on review were presented to the Board on May 3, 2006, by Michael R. Prey for the State and by Richard Sturgeon for Harrison. On this review we possess all powers which we would have possessed had we elected, pursuant to PERB rule 621-2.1, to preside at the evidentiary hearing in place of the ALJ.

FINDINGS OF FACT

Harrison was hired by the State in June, 2002, as a Psychiatric Security Specialist at the CCUSO, which was then located at the Iowa Medical and Classification Center at Oakdale, Iowa. After approximately six months in that position, she was promoted to the position of Treatment Program Supervisor, which she held until her termination on October 18, 2004. At about the same time that Harrison was promoted, the CCUSO was moved from Oakdale to the Cherokee Mental Health Institute and Harrison also relocated to that facility. Dr. Jason Smith became the administrator of the CCUSO in November, 2003.

Harrison was disciplined on three occasions prior to her termination. On May 18, 2004, Harrison received a written reprimand for engaging in a disruptive verbal altercation at the workplace with her then-husband, who was also a CCUSO employee,

who had come to her workplace while he was off duty. On June 25, 2004, Harrison received a one-day suspension for "failing to maintain confidentiality of personnel issues" as directed by management, apparently for divulging confidences (not specified in the record) to her then-husband. On July 14, 2004, Harrison received a three-day suspension for violating a management directive to refrain from contacting her then-husband while at work and for falsely denying that she had telephoned him when questioned about it by management. Harrison did not challenge any of these instances of discipline through the grievance procedures specified in Iowa Code section 8A.415.

On September 21, 2004, Smith and another administrator met with Harrison and informed her they were investigating whether she had misrepresented facts in an earlier investigation which had involved Ruby Dickey, Harrison's supervisor. During this meeting, Harrison was asked if she had had any conversations with other employees about the Dickey investigation. Harrison initially responded that she had not, but later remembered that she had participated in a conversation concerning the investigation with Matt Royster, a social worker at CCUSO with whom she shared a cordial workplace relationship, which she related to Smith. Harrison told Smith that Royster had told her during a smoking break that he had refused to cooperate with

Smith during the investigation and that he had told Smith that the staff should stop sleeping together.

On September 29, 2004, Smith interviewed Royster, who denied having had any conversation with Harrison about the investigation and denied having made the comments Harrison had attributed to him. Royster prepared a written statement to that effect, which he signed and gave to Smith.

On October 11, 2004, Smith requested a written statement from Harrison about her conversation with Royster and she provided it, noting that she thought Royster had been joking and that they had chuckled about what he had said. On October 18, 2004, Smith interviewed Harrison again, and Harrison reiterated her previous statements about what Royster had said to her. Smith decided that Royster's version of events was more credible than Harrison's, based on her disciplinary history, including her July, 2004 suspension for falsely denying she had telephoned her husband from work, and because Royster had not been questioned during the Dickey investigation. Although Royster had also previously received a three-day disciplinary suspension for coming to the CCUSO off-duty while under the influence of alcohol, Smith did not consider this to be relevant because the discipline had not involved Royster's veracity. Smith concluded that Harrison had fabricated the remarks she attributed to Royster and decided that, in light of this incident and her

disciplinary history, termination was warranted. Accordingly, at the conclusion of Smith's October 18 meeting with Harrison, Smith gave her a notice of termination which stated, in relevant part:

> Dear Ms. Harrison:
> Effective 10/18/04, you are being terminated from employment with CCUSO as a result of your violation of the following DHS work rules:
>
> B. 13: You are required to cooperate fully and to be honest in written and oral statements concerning activities which affect the Department or your institution. You may not withhold information or impede any inquiry, investigation, or hearing.
>
> C. 5: You may not make false or malicious statements concerning fellow employees or those we serve.
>
> You violated these work rules on more than one occasion during the course of an investigation.

Harrison appealed her discharge to the director of the Iowa Department of Administrative Services (DAS) pursuant to Iowa Code section 8A.415(2) and chapter 61 of DAS rules, 11 I.A.C. ch. 61. A grievance meeting was held December 30, 2004, at which Harrison was present and Royster was not. A third-step grievance response was issued by the DAS director's designee on January 25, 2005, which upheld Harrison's termination. The director's designee determined that there was just cause for terminating Harrison for not providing truthful information regarding her co-worker, Royster. The director's designee noted

that Harrison had previously been disciplined and noted that Harrison had a history of being dishonest, while Royster did not, and that Harrison "was unable to provide a motivation for the co-worker (Royster) to make false statements."

Harrison timely appealed the third-step response to PERB pursuant to Iowa Code section 8A.415(2) and PERB rule 621-11.2, and an evidentiary hearing was conducted before the ALJ on January 5, 2006. Smith was the only witness who testified for the State. Although Royster was still employed at CCUSO at the time of the hearing, the State did not ask him to appear as a witness, but instead offered the signed statement Royster had provided to Smith, which set out his version of events. This hearsay statement was the only evidence presented at the hearing in support of the allegation that the statements Harrison had made were false. Harrison did appear at the hearing, and testified that Royster had in fact made the statements which she had previously related to Smith orally and in writing.

The ALJ's proposed decision and order, concluding that just cause for Harrison's termination had not been established, was issued on February 2, 2006, and the State timely filed the instant petition for review.

CONCLUSIONS OF LAW

Harrison's appeal was brought pursuant to Iowa Code section 8A.415(2), which provides:

2. *Discipline resolution.* A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise reduced in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the [DAS] director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action.

DAS rule 11-60.2(8A) provides, in relevant part:

11-60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. Disciplinary action involving employees covered by collective bargaining agreements shall be in accordance with the provisions of the agreement. Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave,

unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

* * *

60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee's being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A written statement of the reasons for the discharge shall be sent to the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

The term "just cause" as employed in section 8A.415(2) and administrative rule is not defined by statute or rule. While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include but are not limited to: whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to

the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.[2]

PERB has, however, emphasized that there is no fixed test for determining the presence or absence of just cause, stating:

> . . . [W]e believe that a §19A.14(2) [now 8A.415(2)] just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the case under consideration.

Hunsaker and State of Iowa (DES), 90-MA-13 (1991) at p. 40.

In the present case, we find that the State has failed to establish just cause for Harrison's termination because it failed to establish her commission of the offense for which she was terminated.

In discipline cases under what is now Iowa Code section 8A.415 (formerly 19A.14), the State bears the burden of establishing just cause for the discipline imposed. *See, e.g. Nehring and State of Iowa (Law Enforcement Academy)*, 99-MA-05 (2000). *See also* Elkouri and Elkouri, How Arbitration Works, 6th Ed., BNA (2003), pp. 349, 949.

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[2] *See, e.g., Woods and State of Iowa (DIA)*, 03-MA-01 (2004); *Hoffman and State of Iowa (DOT)*, 93-MA-21 (1993).

In the present case, the only evidence in the record of misconduct by Harrison was Royster's hearsay written statement, which is directly controverted by Harrison's testimony. Royster was still employed by the State at the time of hearing, yet the State did not ask him to testify, did not subpoena him, and offered no explanation for its failure to do so. Harrison's testimony at hearing was consistent with her previous consistent oral and written statements that Royster had made the comments as she claimed. We view Harrison's testimony as credible. We do not think her disciplinary history provides sufficient reason for us to doubt her general veracity. Nor do we find any record evidence of any motive she might have had for inventing a conversation with Royster, with whom she had an apparently cordial relationship. Royster, on the other hand, had an obvious possible motive to lie to Smith in order to avoid discipline (which might have been serious in light of his own record of prior discipline) for discussing the investigation with Harrison. The fact that he had not been questioned during the Dickey investigation does not necessarily mean that he did not make joking comments about it to Harrison.

We simply find Royster's hearsay written statement insufficient to outweigh Harrison's credible live testimony to

the contrary, and thus view it as insufficient to establish misconduct on her part.[3]

Our refusal to give controlling weight to the hearsay statement of an absent but available witness is also supported by the apparent weight of arbitral authority in contractual grievance proceedings, which are directly analogous to those established by section 8A.415 for State employees not covered by a collective bargaining agreement.

Where a discharge case turns on the credibility of witnesses to alleged misconduct who are not present to testify at the hearing, arbitrators generally refuse to credit hearsay written statements by the absent witnesses and find them to be insufficient to support the discharge. *See, e.g., St. Charles Grain Elevator Co. and Teamsters Local 270,* 84 LA 1129 (Fox, 1985); *ABC Rail Products Corp. and UAW Local 1991,* 110 LA 574 (Kenis, 1998); *IBP, Inc. and General Drivers, Local 556,* 112 LA 981 (Lumbley, 1999).

In *ABC Rail Products Corp., supra,* the grievant was discharged for threatening a janitorial employee. The janitorial employee did not testify at the arbitration hearing, but his written statement was admitted into the record through the testimony of a management witness who was present when the

[3] The State argues that Harrison could have subpoenaed Royster if she had wished to question him, but this argument ignores the fact that the State rather than Harrison, bore the burden of proof in this case.

statement was taken. In discussing the problems with such hearsay evidence, the arbitrator quoted Hill & Sinicropi, Evidence in Arbitration, 2d Ed., BNA (1987), p. 135, as follows (in relevant part):

> . . . the inherent problems with the evidence offered by absent witnesses concern its reliability. The . . . statements were not made under oath before a trier of fact, nor are they available for cross-examination to test for the presence of the problems of . . . perception, memory, veracity, and communication. . . . [R]eliance on the . . . testimony would deprive the defendant-grievant of the chance to test whether the co-workers were lying, misremembering or just reporting ineptly.

ABC Rail Products, supra, 110 LA at 579.

The arbitrator noted that ". . . one must always bear in mind the inherent weaknesses in hearsay evidence, particularly in the context of a discipline case where the employer has the burden of proving just cause." *Id.* at 580. In support of his conclusion that the employer failed to meet its burden of proving the grievant guilty of threatening the employee, and thus failing to establish just cause for discharge, the arbitrator stated:

> Here, the core of the Employer's case hinges on the hearsay account of the outside janitorial employee who, for whatever reason, did not appear at the hearing to face the Grievant and test his account against cross-examination. The Employer offered no explanation at the arbitration for the absence of this witness and no attempt was made to subpoena him. Without this individual's testimony, we do not know, for example, whether there was motive to falsely

> accuse the Grievant or whether, as Union witnesses claimed at hearing, he has demonstrated himself to be an unreliable and untrustworthy individual. His unsworn statement cannot be relied upon under these circumstances since, as it developed, the matters contained in his statement were too important to deprive the Union of its right to cross-examination.

In *IBP, Inc. and General Drivers, Local 556, supra,* the arbitrator concluded the employer had not established just cause to discharge the grievant for fighting, where the grievant testified at hearing but the employer presented only written hearsay statements given by others. The arbitrator determined that the hearsay evidence did not outweigh otherwise credible live testimony such as that given at hearing by the grievant, and credited his version of events. *Id.* at pp. 983-84.

We conclude the State failed to carry its burden of establishing just cause within the meaning of Iowa Code section 8A.415(2) for Harrison's discharge. Having reached this conclusion, it is unnecessary for us to consider whether discharge would have been warranted as a sanction had Harrison's violation of the DHS work rules been established.

Accordingly, we issue the following:

ORDER

The State shall reinstate Toni E. Harrison to her former position with back pay and benefits, less interim earnings, restore her benefit accounts to reflect accumulations she would

have received but for her discharge, make appropriate adjustments to her personnel files and take any other actions necessary to restore her employment status to what it would have been had she not been discharged.

This decision constitutes final agency action only on the issue of whether the State established just cause for Harrison's termination. The Public Employment Relations Board retains jurisdiction of this matter in order to specify the precise terms of the remedy, and, in order to prevent further delay in the resolution of this matter, will promptly schedule a hearing within 60 days of the date below to receive evidence on the precise terms of the remedy should the parties fail to reach agreement thereon. Agency action on the appropriate remedy will not be final until its specifics are approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

DATED at Des Moines, Iowa, this 4th day of May, 2007.

PUBLIC EMPLOYMENT RELATIONS BOARD

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